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Bragi Store, LLC, and Bragi North America, LLC

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Bragi GmbH, Bragi Store, LLC, and Bragi  
North America, LLC

Plaintiffs,

vs.

OnePlus Technology (Shenzhen) Co., Ltd. ,

Defendant.

CASE NO.: 3:18-CV-02972-JCS

**MOTION FOR ALTERNATE SERVICE**

**Chief Magistrate Judge Spero**

**Hearing date: July 13, 2018**

**Hearing time: 9:30 a.m.**

**PLEASE TAKE NOTICE** that, on July 13, 2018 at 9:30 a.m. in Courtroom G – 15<sup>th</sup>  
Floor of the United States Courthouse for the Northern District of California, 450 Golden Gate  
Avenue, San Francisco, CA 94102, Plaintiffs Bragi GmbH, Bragi Store, LLC, and Bragi North  
America, LLC (“Plaintiffs”) will and hereby does move for an Order under Federal Rule of Civil  
Procedure 4(f)(3) permitting alternate service of process on Defendant OnePlus Technology  
(Shenzhen) Co., Ltd (“OnePlus”) by registered email with courtesy copies sent by registered  
mail to counsel for Defendant, return receipt requested, based on the points and authorities

1 incorporated herewith, the declarations and exhibits submitted herewith, and any further  
2 argument or evidence as may be submitted prior to the hearing on the motion. A Proposed Order  
3 is submitted with this motion.

#### 4 **Issue to be Decided**

5  
6 Whether under Federal Rule of Civil Procedure 4(f)(3) alternate service to Defendant, a  
7 Chinese company with no known physical location in the U.S., by way of registered email, with  
8 copies sent to counsel by registered mail, comports with due process. The Plaintiffs propose to  
9 serve Defendant's Director and Co-founder, Defendant's European counsel, and Defendant's  
10 U.S. trademark counsel in this manner.

#### 11 **Relevant Facts**

12  
13 On May 18, 2018, Plaintiffs filed their Complaint to address the continued willful  
14 infringement by OnePlus of Plaintiffs' THE DASH and THE DASH PRO trademarks for  
15 wireless ear phones and chargers. *See Complaint*, Dkt No. 1. OnePlus is a Chinese  
16 manufacturer of smart phones, wireless earphones, and related chargers. *Id.* at 7-8. They appear  
17 to sell their products primarily over the internet, and utilize third party shipping companies to  
18 deliver them to customers in the United States. The action was filed in this Court because the  
19 defendant, a Chinese limited liability company, is believed to have a presence in San Francisco  
20 based in part on recent OnePlus employment advertisements identifying the location of the job as  
21 San Francisco. **Declaration of Christina J. Moser** ("Moser Dec.") at ¶2; **Exhibit 1** (About  
22 OnePlus Webpage); and **Exhibit 2** (OnePlus Careers Webpage). Further, at the time of filing,  
23 OnePlus had announced a "pop-up" event to be held to publicly showcase OnePlus's products  
24 (including the infringing products) on May 21, 2018 at the Contemporary Jewish Museum.  
25 **Moser Dec.** at ¶8. At such events, promoted extensively using social media, including  
26 Facebook, OnePlus representatives temporarily show up to market their products, and then  
27  
28

1 leave.<sup>1</sup> *Id.* Other than the now-concluded pop-up events (in San Francisco and New York), no  
 2 physical location for OnePlus in the United States has been located. *Id.* Most of OnePlus's  
 3 customer interactions appear to be conducted electronically over the Internet. *Id.*

4  
 5 OnePlus appears to have multiple places of business in China. On its trademark  
 6 application with the United States Patent and Trademark Office ("USPTO") it identified its  
 7 principal place of business as Room 201, Building A, No. 1 Qianwan Road 1, Qianhai Shenzhen-  
 8 HK Cooperation Zone, Shenzhen, China. *Id.* at ¶5; **Exhibit 3** (USPTO Record).<sup>2</sup> OnePlus's  
 9 address listed in a third party database is 18C05, 18C04, 18C03, 18C02, Shenye Tairan Building,  
 10 North To Binhe Avenue, Futian District, 518040 Shenzhen, China. **Moser Dec.** at ¶5. This  
 11 address is similar to that on the shipping label used by OnePlus. *Id.*; **Exhibit 4** (Photos of  
 12 Infringing Products).

13  
 14 The parties have been communicating regarding this dispute, which extends to OnePlus's  
 15 infringement of Bragi's European and other trademarks. **Moser Dec.** at ¶3. On May 20, 2018,  
 16 counsel for Plaintiffs emailed copies of the Complaint to OnePlus's European trademark counsel,  
 17 who had been participating in discussions on behalf of Defendant relating to Plaintiffs'  
 18 trademark infringement allegations against OnePlus. *Id.* at ¶8; **Exhibit 5** (May 20, 2018 Email).  
 19 The email asked if she could advise whether she was authorized to accept service or, alternately,  
 20 provide Plaintiffs with the address of OnePlus's San Francisco office. *Id.* Plaintiffs explained  
 21 that they wanted to avoid having to personally serve OnePlus at its May 21<sup>st</sup> public pop-up event.  
 22 *Id.* OnePlus's counsel never responded to that email. **Moser Dec.** at ¶9. The evening of May  
 23 21<sup>st</sup>, Plaintiffs' process server went to the designated location for the pop-up event, and  
 24 attempted to hand a copy of the Complaint and other initiating documents to OnePlus's  
 25  
 26

27  
 28 <sup>1</sup> Despite its business presence in California, OnePlus has failed to register itself with the California Secretary of State as a business entity, making service of legal documents on them all the more difficult.

<sup>2</sup> Plaintiffs ask that the Court take judicial notice of the records of the U.S. Patent and Trademark Office, to the extent necessary.

1 representative. *Id.*; **Exhibit 6** (Declaration of Reasonable Diligence). The process server was  
 2 intercepted by security at the event, told that the only persons at the event were OnePlus  
 3 “consultants,” rather than employees, and was forcibly escorted from the premises. *Id.*

4  
 5 OnePlus’s products have been accused of infringing intellectual property rights in  
 6 multiple U.S. courts. **Moser Dec.** at ¶7; **Exhibit 7** (PACER Report).<sup>3</sup> In the past two years, two  
 7 actions by separate parties were filed in this Court and the Eastern District of Texas accusing  
 8 OnePlus’s smartphones of patent infringement. *Id.* Those actions were dismissed without  
 9 prejudice when it was discovered that the named defendant, “OnePlus, Inc.,” was not related to  
 10 OnePlus. *Id.* A third patent infringement action, filed over a year ago, on January 30, 2017, in  
 11 the District of Delaware against the proper OnePlus entity, stands in limbo as the plaintiff awaits  
 12 service of the complaint under *The Convention on Service Abroad of Judicial and Extrajudicial*  
 13 *Documents in Civil and Commercial Matters*, Nov. 15, 1965 (Hague Service Convention),  
 14 (1969) 20 U.S.T. 361, T.I.A.S. No. 6638. *Id.* The most recent status report in that case, dated  
 15 April 2, 2018, indicated that the Chinese Ministry of Justice could not confirm service, nor  
 16 provide any information about when it could be expected, other than that the expected service  
 17 time for such materials in China is between one and two years. *Id.*

18  
 19 Plaintiffs have been attempting to stop OnePlus’s worldwide infringement of its  
 20 trademarks, to no avail. At the beginning of the year, OnePlus announced that it is now focusing  
 21 on the U.S. market, which is confirmed by OnePlus’s recent OnePlus 6 launch efforts and  
 22 apparent hiring of marketing employees in the United States. *See* Dkt No. 1, *Complaint* at ¶8;  
 23 **Exhibit 2**. On May 29, 2018, Plaintiffs confirmed that OnePlus’s recent launch of its new  
 24 OnePlus 6 smartphone are being sold and shipped with the infringing power cables and chargers  
 25  
 26  
 27

28 <sup>3</sup> Plaintiffs ask that the Court, to the extent necessary, take judicial notice of the court records for: *Lightwire, LLC v. OnePlus, Inc.*, Case No. 3:2018cv01163 (N.D. Cal.); *Koninklijke KPN N.V. v. OnePlus Technology*, Case No. 1:2107cv00089 (D. Del.); and *Deshodax LLC v. OnePlus, Inc.*, Case No. 5:2017-cv-00083 (E.D. Tex.).

1 that prominently bear the infringing DASH trademark. **Moser Dec.** at ¶4; **Exhibit 4**  
2 (Photographs of Infringing Products). Continued shipping of the infringing products will  
3 undermine Plaintiffs' trademark rights and irreparably harm Plaintiffs' goodwill. Plaintiffs  
4 cannot, and should not be expected to, wait for two years to commence this litigation,  
5 particularly as OnePlus takes advantage of the United States market by selling its products here,  
6 but avoids service of process at all costs.  
7

### 8 **Argument**

9 Under Federal Rules of Civil Procedure 4(f)(3) and 4(h)(2), the Court may direct service  
10 "by other means not prohibited by international agreement, as the court orders," because  
11 OnePlus is a foreign company. *See* Fed. R. Civ. P. 4(f)(3) and 4(h)(2). "[S]ervice of process  
12 under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief.' [citation omitted] It is  
13 merely one means among several which enables service of process on an international  
14 defendant." *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002).  
15

16 Although China is a signatory to the Hague Service Convention, service is not practical  
17 in this case under Fed. R. Civ. P. 4(f)(1) because the waiting time for service in China under the  
18 Hague Service Convention takes 1-2 years, at best. Numerous courts in this District have found  
19 alternate service methods appropriate without a prior attempt to serve through the Hague Service  
20 Convention. *See, e.g., In re LDK Solar Sec. Litig.*, No. 07-05182, 2008 WL 2415186, at \*2  
21 (N.D.Cal. June 12, 2008); *Juicero, Inc. v. iTaste Co.*, No. 17-cv-01921-BLF, 2017 WL 3996196  
22 \*2 (N.D. Cal. 2017) (service of trademark lawsuit on Chinese defendants through U.S. counsel  
23 and Facebook).  
24

25 China's objections to Article 10 of the Hague Service Convention, which permits service  
26 via postal channels, do not prevent service by electronic mail or substitute service on U.S.-based  
27 counsel. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litigation*, 27 F.Supp. 3d 1002 (N.D.  
28 Cal. 2017) (approving service on Chinese defendant by mail to its U.S. counsel); *Williams-*  
**MOTION FOR ALTERNATE SERVICE**

1 *Sonoma Inc. v. Friendfinder Inc.*, No. 06-06572-JSW, 2007 WL 1140639, at \*2 (N.D. Cal. Apr.  
 2 17, 2007) (distinguishing email from postal mail and concluding that service by email to parties  
 3 in the Czech Republic, Norway, Switzerland, and Ukraine was permissible); *In re LDK*, 2008  
 4 WL 2415186, at \*3 (permitting service of Chinese defendants under Rule 4(f)(3) via email to  
 5 U.S. counsel, despite China's objections to Article 10, because the service requested did not  
 6 involve service by "postal channels"); *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, 2011 WL  
 7 2607158, at \*12 (N.D. Cal. July 1, 2011) (email service acceptable even as to countries objecting  
 8 to Article 10 of the Hague Service Convention); *Facebook, Inc. v. Banana Ads, LLC*, No. 11-  
 9 3619-YGR, 2012 WL 1038752, at \*2 n.5 (N.D. Cal. Mar. 27, 2012) (finding that email service to  
 10 Hong Kong, "a special administrative region of the People's Republic of China," was  
 11 acceptable).

12  
 13  
 14 Plaintiffs' proposed service means comports with Due Process. The Ninth Circuit  
 15 underscored in *Rio* that, when email was the "method of service aimed directly and instantly" at  
 16 the defendant, email would be reasonably calculated to apprise the defendant of the pendency of  
 17 the lawsuit. 284 F.3d at 1018. "As other courts in this district have noted, where defendants  
 18 conduct commercial internet activities, email service is reasonably calculated to apprise them of  
 19 the suit and thus comports with due process." *Microsoft Corp. v. FIFAVIP Co., Ltd.*, Case No.  
 20 17-cv-02887-LHK, 2017 WL 4517060 \*5 (N.D. Cal. Oct. 10, 2017) (authorizing service on  
 21 Chinese defendants via registered email). Likewise, the defendant in this case conducts its  
 22 commercial activities primarily over the internet and it has authorized its U.S. and European  
 23 legal representatives to communicate and receive document using their respective email  
 24 addresses. Moreover, Defendant's Director and European counsel communicate in English, and  
 25 so serving copies of the initiating documents in English does not violate due process. **Moser**  
 26 **Dec.** at ¶¶3, 10; **Exhibit 8** (Pei Article); **Exhibit 9** (Fowler Firm Biography).

1 Plaintiffs have recently communicated with Defendant's Director and Co-founder and its  
 2 European counsel by email utilizing the same email addresses identified in the Proposed Order.  
 3 **Moser Dec.** at ¶3. Defendant authorized the United States Patent and Trademark Office to send  
 4 official correspondence to the email addresses provided by its U.S. trademark counsel. *Id.* at ¶5;  
 5 **Exhibit 3** (USPTO Record). Email service to Defendant's Director and Co-founder, European  
 6 counsel, and U.S. trademark counsel, with copies sent to Defendant's counsel via registered mail,  
 7 is more than reasonably calculated to apprise the Defendant of the pendency of this lawsuit.  
 8

9 Accordingly, for the foregoing reasons, OnePlus respectfully requests an Order approving  
 10 alternate service on OnePlus as set forth above and in the Proposed Order submitted concurrently  
 11 herewith.

12 Dated: June 7, 2018

Respectfully submitted,

14 /s/ Christina J. Moser

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24 Attorneys for Bragi GmbH, Bragi Store, LLC,  
 25 and Bragi North America, LLC  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2018, I filed the foregoing Motion for Alternate Service and the accompanying exhibits via the Court's ECF system. Because Plaintiffs have been unable to effectuate service of process of the Complaint upon Defendant, and that this motion seeks leave to do so via email and registered mail, Plaintiffs have served a copy of this Motion as follows:

***Via registered email to:***

Carl Pei  
Director, OnePlus Technology (Shenzhen)  
Co., Ltd  
[carl@oneplus.com](mailto:carl@oneplus.com)

***Via registered email and registered mail to:***

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By: /s/ Christina J. Moser  
Christina J. Moser, counsel for Plaintiffs